on the decedent's capital and undistributed earnings of the partnership.

5. The facts upon which the petitioner relies, are as follows:

(a) Lamar L. Fleming died on December 16, 1933. Under his will the Guaranty Trust Company of New York and Lamar Fleming, Jr. were appointed executors of the estate. The decedent kept his books and made his income tax returns upon the cash receipts and disbursements basis; his income tax returns were rendered on the calendar year basis.

(b) At the time of his death the decedent was a member of the partnership of Anderson, Clayton & Fleming of 60 Beaver Street, New York, N. Y. This partnership was engaged in the business of buying and selling cotton, the handling of foreign exchange and the conducting of financing operations incidental to the cotton business. The annual accounting period of the partnership was a fiscal year [fol. 7] ending July 31 of each calendar year and its books and accounts were kept on the cash receipts and disbursements basis. For income tax purposes, the income of the partnership was computed in accordance with the method of keeping its books and its returns were rendered upon the basis of the fiscal year employed by the partnership.

(c) After the close of its fiscal year ended July 31, 1933, Anderson, Clayton & Fleming filed a partnership return of income showing its net income for the period August 1, 1932 to July 31, 1933, and each partner's share of such income.

(d) The partnership agreement of Anderson, Clayton & Fleming made no provision for termination of its accounting period upon the death of a partner. Following the death of Lamar L. Fleming and until the partnership was liquidated some time during 1934, the business of the partnership was continued by the surviving partners. Early in May, 1934, the surviving partners formed a new partnership pursuant to an agreement dated as of December 18, 1933, and the business of Anderson, Clayton & Fleming was taken over by the new partnership.

(e) On or about January 9, 1934, the executors of the estate of Lamar L. Fleming received a partial distribution

in liquidation of the old partnership. Such distribution consisted of the capital invested by the decedent in the partnership, undistributed earnings (including earnings for the period August 1 to December 16, 1933), and interest on both capital and undistributed earnings to the date of dis- [fol. 8] tribution. On or about February 5, 1934, the executors received a further distribution in liquidation of the parnership amounting to $15,067.39, which consisted of accrued commissions on transactions which had not been completed either at the time of the decedent's death or on February 5, 1934, when such distribution was made.

(f) At no time prior to the decedent's death did he receive any portion of the profits of the partnership for the period between August 1 and December 16, 1933, nor did the representatives of the decedent receive any portion of such profits until January 9 and February 5, 1934, as stated above. The partnership of which the decedent was a member at the time of his death was not liquidated during the calendar year 1933, nor did any taxable year of such partnership terminate during the calendar year 1933 other than the fiscal which year ended July 31, 1933.

(g) On or about March 15, 1934, the executors of the estate of Lamar L. Fleming filed a Federal income tax return covering the period from January 1, 1933, to the date of the decedent's death on December 16, 1933. There was included in such return an amount representing the decedent's distributive share of the income of the partnership of Anderson, Clayton & Fleming for the period August 1, 1932 to July 31, 1933, but such return did not include in income of the decedent any portion of the income of the partnership between August 1, 1933 and the date of the decedent's death. In the estate tax return filed by the executors of the estate of Lamar L. Fleming there was included in the [fol. 9] gross estate the value of the decedent's interest in Anderson, Clayton & Fleming, including the decedent's share of income of the partnership for the period August 1 to December 16, 1933.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

1. That none of the income of the partnership of Anderson, Clayton & Fleming between August 1 and December

16, 1933, should be included in the income of the decedent for the period covered by the prior-to-death return filed on decedent's behalf.

2. That no taxable year of such partnership ended between January 1 and December 16, 1933, other than the fiscal year of the partnership ended July 31, 1933.

3. That the only income of such partnership which should be included in the income of the decedent for the period from January 1 to December 16, 1933, is the decedent's share of the income of such partnership for its fiscal year ended July 31, 1933.

4. That there is no deficiency in income taxes of the decedent for the period from January 1 to December 16, 1933;

And for such other relief as to this Board may seem proper.

(Signed) Weston Vernon, Jr., Attorney for Petitioner, 15 Broad Street, New York, N. Y.

[fol. 10] *Duly sworn to by W. C. Bloom. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

Copy

IT:AR:A-1. Oct. 25, 1934.
FBN-90D.

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, 140 Broadway, New York, New York.

SIRS:

You are advised that the determination of the income tax liability of Lamar L. Fleming, deceased, for the year 1932 and period from January 1 to December 16, 1933, discloses a deficiency of $39,874.31 for the period January 1 to December 16, 1933 and an overassessment of $1,956.92 for the year 1932, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from

the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an [fol. 12] early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by

(Signed) Chas. T. Russell, Deputy Commissioner.

Enclosures: Statement, Form 874.
FBN/TA-2.

Statement

IT:AR:A-1.
FBN-90-D.

In re Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, 140 Broadway, New York, New York

	Income Tax Liability			
Year	Income Tax Liability	Income Tax Assessed	Over assessment	Deficiency
1932	$25,611.34	$27,568.26	$1,956.92	.....
Period January 1 to December 16, 1933	116,254.37	76,380.06	.....	$39,874.31
Total	$141,865.71	$103,948.32	$1,956.92	$39,874.31

[fol. 13] The deficiency shown herein is based upon the report dated July 12, 1934, prepared by Revenue Agent W. C. Baptist, and transmitted to you under date of August 11, 1934.

1932

Net income reported	$116,816.39
Deduct:	
1. Partnership profits	5,000.00
Net income adjusted	$111,816.39

Explanation of Changes

1. Income from the partnership for the period August 1, 1931 to July 31, 1932, of Anderson, Clayton and Fleming, was overstated by $5,000.00. The audit of the partnership return discloses the correct net income to be $306,543.02 and the decedent's share to be $102,190.83 instead of $107,190.83 as reported.

2

Statement

Guaranty Trust Company of New York, Executor
Estate of Lamar L. Fleming, Deceased

Computation of Tax

Net income as adjusted		$111,816.39
Less:		
Taxable at 1931 rates		42,579.51
Net income subject to 1932 rates		$69,236.88
[fol. 14] Less:		
Dividends	$1,587.52	
Personal exemption	1,000.00	
		2,567.52
Balance subject to normal tax		$66,669.36
Normal tax at 4% on $4,000.00		160.00
Normal tax at 8% on $62,669.36		5,013.55
Surtax on $69,236.88		10,215.80
Normal tax at 5% on $42,579.51 (1931 rates)		2,128.98
Surtax (1931 rates) on $42,579.51		8,093.01
Total tax assessable		$25,611.34
Tax previously assessed		27,568.26
Overassessment		$1,956.92

January 1 to December 16, 1933

Net income reported	$181,217.94
Add:	
1. Interest not reported	5,559.19
2. Partnership profits	63,494.46
Net income adjusted	$250,271.59

Statement

Guaranty Trust Company of New York, Executor

Estate of Lamar L. Fleming, Deceased

Interest, Helm note received August 18, 1933	$50.00
[fol. 15] Interest, personal account, Anderson, Clayton and Fleming, credited December 16, 1933	3,209.19
Interest, capital account as of December 16, 1933	2,300.00
Total interest not reported	$5,559.19

2. Partnership profits have been increased by $63,494.46. The report covering an examination of the partnership records for the period August 1, 1932 to July 31, 1933, discloses a net income of $392,850.23 and the decedent's distributable share to be $127,775.72.

The report covering an examination of the partnership records for the period August 1, 1933 to December 16, 1933, discloses a net income of $195,367.56. The decedent's distributable share is $63,494.46, which amount has been added to his taxable income in accordance with the provisions of article 902 of Regulations 77, relating to the Revenue Act of 1932.

Computation of Tax

Net income adjusted		$250,271.59
Add:		
Capital loss		1,101.79
Ordinary income adjusted		$251,373.38
Less:		
Dividends	$1,555.86	
Personal exemption	1,000.00	
		2,555.86
Balance subject to normal tax		$248,817.52
[fol. 16] Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $244,817.52		19,585.40
Surtax on $251,373.38		96,646.69
Total tax		$116,392.09

Statement

Guaranty Trust Company of New York, Executor
Estate of Lamar L. Fleming, Deceased

Brought forward	$116,392.09
Less:	
12½% of capital loss of $1,101.79	137.72
Total tax assessable	$116,254.37
Tax previously assessed	76,380.06
Deficiency	$39,874.31

Due consideration has been given to your request that the income tax liability of the above-named estate be determined at the earliest practicable date.

A copy of this letter, together with a copy of the statement has been mailed to your representative, Mr. Walter D. Fletcher, 15 Broad Street, New York, New York, in accordance with the authority conferred upon him in the power of attorney, executed by you and on file with the Bureau.

FBN/EH-1.

[fol. 17] Before United States Board of Tax Appeals

[Title omitted]

Answer

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed January 19, 1935, admits and denies as follows:

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the averments contained in paragraph 4 of the petition.

5. Admits the averments contained in paragraphs 5(a), (b), (c) and (g); for lack of sufficient information upon which to form a belief, denies the remaining averments of

the petition and will require proof thereof upon the hearing of this appeal.

[fol. 18] Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel: Harold Allen, R. H. Transue, Special Attorneys, Bureau of Internal Revenue.

HA-afh 2-11-35.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the following facts are true, reserving, [fol. 19] however, to either party the right to introduce other evidence:

1. Lamar L. Fleming (hereinafter referred to as the decedent), died December 16, 1933. Prior to his death, the books of the decedent were kept on the cash receipts and disbursements basis and the decedent reported his income for Federal income tax purposes upon the same basis. Prior to his death the decedent's income tax returns were made upon the calendar year basis.

2. Under the will of the decedent, Guaranty Trust Company of New York, of 140 Broadway, New York, N. Y. and Lamar Fleming, Jr., of Houston, Texas, were appointed and qualified as executors of the estate of the decedent.

3. Prior to his death the decedent was a member of a partnership known as Anderson, Clayton & Fleming, maintaining its principal office in New York, which was engaged in the business of buying and selling cotton, the handling of foreign exchange and the conducting of financing operations incidental to the cotton business. The partnership of Anderson, Clayton & Fleming was formed in September, 1918, and operated thereafter under successive partnership agreements. As of August 1, 1930, a partnership agreement was executed by the partners of Anderson, Clayton &

Fleming, which continued in force up to and including July 31, 1933. A true copy of such partnership agreement of August 1, 1930 is attached hereto and marked Exhibit A. Upon the admission of William Leland Anderson to the firm [fol. 20] as of August 1, 1933, a partnership agreement was executed, effective as of that date, which was identical in all respects to the agreement of August 1, 1930, except for the division of profits among the partners. A true copy of the partnership agreement executed as of August 1, 1933, is attached hereto and marked Exhibit B.

4. The partnership existing under the agreement of August 1, 1930 kept its books and reported its income to the Treasury Department for income tax purposes upon the cash receipts and disbursements basis. It kept its books and reported its income to the Treasury Department upon the basis of a fiscal year ended July 31 of each year. Upon the termination of the fiscal year of such partnership ended July 31, 1933, and pursuant to the articles of partnership then in effect, the profits of the partnership for the preceding twelve months were computed and the partners were notified of their respective shares of such profits. Part of the profits earned during the fiscal year ended July 31, 1933, belonging to the decedent were not immediately withdrawn by him but were left on deposit with the partnership.

5. The partnership agreement in effect at the time of the decedent's death contained no specific provision as to the method of liquidation in the event of the death of a partner. However, Article Ninth of the partnership articles provided, in part, that:

"In the event of any dissolution of the copartnership under any provision of this agreement or in any manner [fol. 21] or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits."

6. Following the decedent's death on December 16, 1933, the business of the partnership was continued under the same name by the surviving partners. Early in May, 1934, the surviving partners executed a partnership agreement

dated as of December 18, 1933. A true copy of such agreement dated as of December 18, 1933, is attached hereto as Exhibit C.

7. Following the death of the decedent, an audit of the accounts of the partnership was made for the period August 1 to December 16, 1933, inclusive. Such audit was completed on January 30, 1934, and showed net earnings of $154,517.75, after including certain commissions on "open" contracts not received by the partnership on January 30, 1934, amounting to $42,753.05, and after deducting certain losses on the revaluation of partnership investments amounting to $41,241.10, all as more fully set forth in the statement of earnings attached hereto as Exhibit D. The losses on the revaluation of partnership investments were computed as shown on the statement attached hereto as Exhibit E.

[fol. 22] 8. The commissions on "open" accounts of the partnership, amounting to $42,753.05 as of December 16, 1933, were uncollected commissions earned by the partnership upon purchases and sales of cotton for future delivery. Such commissions had not been collected by the partnership at the time of the decedent's death and were not collected until some time during 1934. The Laws of the New York Cotton Exchange in force prior to and since the decedent's death provide that a commission shall be paid upon each 100 bales of cotton bought or sold for future delivery. Such commissions are earned immediately upon the purchase or sale of the future, but the practice of the trade is that no bill is rendered and no commission is paid until the contract entered into has been liquidated. It was not the practice of the partnership to accrue on its books at the end of a fiscal year the commissions due the firm on such "open" transactions.

9. Under the partnership agreement in force at the time of the decedent's death, he was entitled to 32½% of the earnings thereof. The audit of the books of the old partnership showed that the decedent was entitled to profits for the period from August 1 to December 16, 1933, amounting to $50,218.27, or 32½% of $154,517.75, the amount of net profits of the firm for that period, as computed in the attached Exhibit D.

10. The audit of the books of the partnership also showed that the decedent had a credit balance with the firm amount-

ing to $162,795.67, consisting of earnings not withdrawn [fol. 23] from the firm and that the decedent had contributed capital of $100,000 to the firm.

11. Liquidation of the partnership was commenced early in 1934. On or about January 9, the executors of the decedent's estate received from the firm $298,730.10, made up as follows:

(1) 32½% of earnings of the firm between August 1 and December 16, 1933, amounting to $108,156.55 (the latter figure not including any part of the commissions on "open" transactions between August 1 and December 16, 1933)	$35,150.88
(2) Credit balance of the decedent	162,795.67
(3) Capital contributed by the decedent	100,000.00
	$297,946.55
(4) Interest	783.64
	$298,730.19

12. On or about February 5, 1934, the executors were paid the further principal amount of $15,067.39, and interest of $82.58. The amount of $15,067.39 included $13,894.74 as the decedent's 32½% of a total of $42,753.05 commissions on "open" transactions as of December 16, 1933. No part of such commissions were collected by the partnership until some time during 1934.

[fol. 24] 13. Prior to the death of the decedent, no part of the profits of the partnership for the period from August 1 to December 16, 1933, was distributed to the decedent. No portion of such profits was distributed either to the decedent or to his executors during the calendar year 1933.

14. On or about March 15, 1934, the executors of the Estate of Lamar L. Fleming filed the decedent's prior-to-death Federal Income Tax Return for the period January 1, 1933 to December 16, 1933. Such return was filed with the Collector for the Second District of New York at New York City, N. Y. In such return the executors reported the decedent's ordinary net income for this period as $182,319.73, reported a capital loss of $1,101.79, and a tax of $76,380.06 was paid thereon. The income reported by the

executors for the prior-to-death period, included the decedent's distributive share of the income of the partnership of Anderson, Clayton & Fleming for the full twelve months of the fiscal year of the old partnership from August 1, 1932 to July 31, 1933. Such return did not include any portion of the income of the firm for the period August 1 to December 16, 1933, nor was any deduction taken in such return for the losses on revaluation of firm investments shown on Exhibit E attached hereto.

15. By letter dated October 25, 1934, the Commissioner of Internal Revenue notified the petitioner that he had determined a deficiency in tax in the decedent's prior-to-death return of $39,874.31. The Commissioner's notice of [fol. 25] deficiency disclosed that the alleged deficiency arose from the Commissioner's addition to the decedent's income, as reported by the executors, of the amount of $63,494.46, representing "partnership profits" and the amount of $5,559.19, representing "interest not reported".

16. The item of $63,494.46 referred to as "partnership profits" in the notice of deficiency herein, consisted of the decedent's share of uncollected commissions on "open" transactions, and the decedent's share of earnings of the partnership for the period from August 1 to December 16, 1933, after eliminating the losses on revaluation of the partnership investments, set forth in Exhibit E attached hereto.

17. The amount of $5,559.19, referred to in the notice of deficiency herein as "interest not reported", consisted of $3,209.19, representing interest from August 1 to December 16, 1933, upon the credit balance of the decedent with the partnership as of December 16, 1933; the further amount of $2,300, representing interest upon the decedent's capital account with Anderson, Clayton & Fleming for the same period, and $50.00 interest received by the decedent from a source other than the partnership, which amount was omitted from the return. No portion of the interest upon the decedent's credit balance or upon the decedent's capital account for the period from August 1 to December 16, 1933, was credited to the decedent on the books of the partnership prior to his death, nor was such interest received by the executors of the decedent during the calendar year 1933.

[fol. 26] 18. In the prior-to-death income tax return of the decedent for the period January 1 to December 16, 1933,

the decedent's executors deducted the amount of $726.65 as deductible charitable contributions of the decedent. This amount included the amount of $583.65, representing the decedent's pro rata share of donations made by Anderson, Clayton & Fleming for the full fiscal year of the partnership August 1, 1932 to July 31, 1933, and also the further amount of $143.00, representing personal donations made by the decedent for the period January 1 to December 16, 1933. The decedent's executors did not deduct in the decedent's return for the prior-to-death period January 1 to December 16, 1933, the decedent's pro rata share of the charitable donations made by the partnership for the period August 1, 1933 to December 16, 1933. The donations made by Anderson, Clayton & Fleming for such period amounted to $835.50, the decedent's share of which was $271.54. In computing the alleged deficiency in the decedent's taxes for the period from January 1 to December 16, 1933 the Commissioner did not allow the decedent a deduction for the decedent's share of charitable contributions made by the old partnership for the period from August 1 to December 16, 1933.

19. In the Federal estate tax return filed by the executors of the estate of Lamar L. Fleming, there was included in the gross estate the decedent's interest in the firm of Anderson, Clayton & Fleming at a fair market value as of the date of death of $313,013.94, computed as follows:

(1) Credit balance of the decedent with the firm [fol. 27]	$162,795.67
(2) Capital contributed to the firm by the decedent	100,000.00
(3) The decedent's share of net earnings of the partnership for the period from August 1 to December 16, 1933	50,218.27
	$313,013.94

Item (3) above, amounting to $50,218.27, was 32½%, or the decedent's proportionate share of the earnings of the old partnership for the period from August 1 to December 16, 1933, as shown on the statement of earnings attached hereto as Exhibit D. Upon the audit of the Federal estate tax return so filed by the executors of the decedent's estate, the value of the decedent's interest in the firm of

Anderson, Clayton & Fleming as reported in such return was accepted and the tax was paid.

20. On October 14, 1933, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department therefor, a partnership return of income for Anderson, Clayton & Fleming for the fiscal year of the partnership begun August 1, 1932 and ended July 31, 1933.

21. On February 28, 1934, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department [fol. 28] therefor, a return stated to be on behalf of "Anderson, Clayton & Fleming in Liquidation". Such return was signed and sworn to by William H. Koar, and was designated "Partnership Return of Income. For Fiscal Year 1933. Fiscal Year Begun August 1, 1933 and ended 12/16/33". No permission was obtained from the Commissioner of Internal Revenue to file such return.

22. On October 28, 1934, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department therefor, a return on behalf of "Anderson, Clayton & Fleming". Such return was signed by William H. Koar and was designated "Partnership Return of Income. For Fiscal Year 1934. Fiscal Year Begun December 17, 1933 and ended July 31, 1934".

23. On or about March 5, 1935, the executors of the estate of the decedent waived the restrictions upon the assessment of $37,917.39, out of a total deficiency in tax determined by the Commissioner in his letter of October 25, 1934, amounting to $39,874.31. Such waiver was made after the petition to the Board of Tax Appeals had been filed herein, and was made without prejudice to the right of the executors to prosecute the pending appeal and to recover any amount refundable under the final decision of the Board herein. Following the waiver of the restrictions upon the assessment of $37,917.39, the Commissioner assessed such amount against the executors of the decedent, [fol. 29] together with interest thereon in the amount of $2,318.67, making a total of $40,236.06. The Commissioner applied as a credit against such taxes and interest the amount of an over-assessment in the decedent's income tax

for the calendar year 1932, amounting to $1,956.92, together with interest thereon amounting to $149.02, and issued a notice and demand upon the decedent's estate for a total of $38,130.12, consisting of $35,811.45 in tax and interest of $2,318.67, totaling $38,130.12, which was paid by the decedent's executors on April 15, 1935.

Weston Vernon, Jr., Counsel for the Petitioner.
(Sgd.) Robert H. Jackson, Counsel for the Respondent.

Dated Nov. 11, 1935.

[fol. 30] EXHIBIT "A"

This Agreement made and entered into by and between and among Monroe D. Anderson of Houston, Texas, party of the first part, William L. Clayton of Houston, Texas, party of the second part, Lamar L. Fleming of New York, New York, party of the third part, Lamar Fleming, Junior, of Houston, Texas, party of the fourth part, Dudley B. Cannafax of Houston, Texas, party of the fifth part, William J. Jung of Brooklyn, New York, party of the sixth part, Harmon Whittington of Houston, Texas, party of the seventh part, William H. Koar of Hawthorne, New Jersey, party of the eighth part, and Anderson, Clayton & Co., a Joint Stock Association of Houston, Texas, party of the ninth part:

Witnesseth, That

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to and do hereby associate themselves together as a co-partnership to engage in general business for the purposes and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

[fol. 31] First. The firm name of the said co-partnership shall be Anderson, Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of August 1st, 1930, and shall continue until July 31st, 1931, (hereinafter sometimes called "the fiscal year"), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time.

Fourth. The capital which shall be contributed by the several partners at the beginning of the term may be added to or increased at any time during the term. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such addi-
[fol. 32] tional contribution is made or at any time after, but the original contributions to capital shall remain in the business throughout the term of the co-partnership except as herein otherwise provided. All capital shall bear interest at the rate of six per centum (6%) per annum, or at such other rate as mutually may be agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

The said Lamar L. Fleming shall contribute to the capital of the co-partnership the sum of One Hundred Thousand ($100,000.00) Dollars in cash, and the said Anderson, Clayton & Co., shall contribute to the capital of the co-partnership the sum of Two Hundred Thousand ($200,-000.00) Dollars in cash, and neither the said Lamar L. Fleming or said Anderson, Clayton & Co. shall withdraw capital below the sum of Three Hundred Thousand ($300,-000.00) Dollars without the consent of all the partners. The said Anderson, Clayton & Co. does further agree to

furnish any additional capital required for the conduct of the affairs of the partnership over and above the Three Hundred Thousand ($300,000.00) Dollars provided as above set forth.

Fifth. At all times during the continuance of said co-partnership the said Lamar L. Fleming, William J. Jung and William H. Koar shall devote their best skill and energy for the purpose of conducting the business of said co-partnership, with said Lamar L. Fleming in charge of the [fol. 33] general management thereof. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon loans and upon capital, taxes, and all losses for the preceding year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts, shall be charged off and deducted from earnings; and such reserves shall be set up and deducted for outstanding liabilities, liquidated, contingent or deferred, or otherwise as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

(1) 17.7855% shall be paid to Monroe D. Anderson,

(2) 23.4072% shall be paid to William L. Clayton,

[fol. 34] (3) 33.3333% shall be paid to Lamar L. Fleming,

(4) 8.0317% shall be paid to Lamar Fleming, Junior,

(5) 2.0% shall be paid to Dudley B. Cannafax,

(6) 7.0% shall be paid to William J. Jung,

(7) 3.4423% shall be paid to Harmon Whittington,

(8) 5.0% shall be paid to William H. Koar, Provided, however, that William J. Jung shall receive seven per centum (7%) of the net gains and profits or the sum of Twenty-Five Thousand ($25,000) Dollars, whichever amount is greater, and William H. Koar shall receive the said five per centum (5%) of the net gains and profits or the sum of Twelve Thousand Five Hundred ($12,500) Dollars, whichever amount is greater,

and provided further that if the net gains and profits for any one fiscal year are less than or equal to Thirty-Seven Thousand Five Hundred ($37,500) Dollars, then in that event all of such net gains and profits are to be divided two-thirds to William J. Jung and one-third to William H. Koar.

and still further provided that if twelve per centum (12%) of the said net gains and profits are less than Thirty-seven Thousand Five Hundred ($37,500) Dollars, then in that [fol. 35] event the participation of the partners other than William J. Jung and William H. Koar shall be reduced proportionately to the extent that the sum of Thirty-Seven Thousand Five Hundred ($37,500) Dollars exceeds twelve per centum (12%) of the said net gains and profits.

In case of a net loss for any fiscal year, such net loss shall be borne by the said co-partners in the same proportion of their respective percentages of participation in the net gains and profits.

Seventh. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks,

promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transaction, business or contract outside of the regular business of the firm.

[fol. 36] Eighth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than thirty days written notice signed by all the other partners and served upon such partner.

Ninth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits. It is further understood and agreed that as to any one of the parties hereto, his interest in the firm shall be in accordance with this agreement and not otherwise, and that nothing whatsoever shall be paid to the estate of any deceased partner for good-will; any claim or right of each partner to have his estate participate in the good-will of said business in the event of his death is hereby expressly waived and surrendered.

[fol. 37] In Witness Whereof, the parties hereto have executed this agreement as of the first day of August, 1930:

Witness:

C. A. Couch, G. M. Cline, E. M. Kronberg, A. Bryan, Leah Hughes, E. M. Kronberg, R. Vinson, A. O'Donnell, C. A. Couch, Monroe D. Anderson, W. L. Clayton, L. L. Fleming, Lamar Fleming, Jr., Dudley B. Cannafax, William J. Jung, Harmon Whittington, W. H. Koar, Anderson, Clayton & Co., by M. D. Anderson, W. L. Clayton, Managing Director.

[fol. 38] EXHIBIT "B"

Anderson, Clayton & Fleming

Partnership Agreement, August 1, 1933

"This Agreement made and entered into by and between and among Monroe D. Anderson of Houston, Texas, party of the first part, William L. Clayton of Houston, Texas, party of the second part, Lamar L. Fleming of New York, New York, party of the third part, Lamar Fleming, Junior, of Houston, Texas, party of the fourth party, Harmon Whittington of Houston, Texas, party of the fifth part, Dudley B. Cannafax of Houston, Texas, party of the sixth part, William J. Jung of Brooklyn, New York, party of the seventh part, William H. Koar of Glen Rock, New Jersey, party of the eighth part, William Leland Anderson of New York, New York, party of the ninth part, and Anderson Clayton & Co., a Joint Stock Association of Houston, Texas, party of the tenth part:

Witnesseth, That

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to [fol. 39] and do hereby associate themselves together as a co-partnership to engage in general business for the purpose and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

First. The firm name of the said co-partnership shall be Anderson, Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934, (hereinafter sometimes called "the fiscal year"), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time.

[fol. 40] Fourth. The capital which shall be contributed by the several partners at the beginning of the term may be added to or increased at any time during the term. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such additional contribution is made or at any time after, but the original contributions to capital shall remain in the business throughout the term of the co-partnership except as herein otherwise provided. All capital shall bear interest at the rate of six per centum (6%) per annum, or at such other rate as mutually may be agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

The said Lamar L. Fleming shall contribute to the capital of the co-partnership the sum of One Hundred Thousand ($100,000.00) Dollars in cash, and the said Anderson, Clayton & Co., shall contribute to the capital of the co-partnership the sum of Two Hundred Thousand ($200,000.00) Dollars in cash, and neither the said Lamar L. Fleming nor said Anderson, Clayton & Co. shall withdraw capital below the sum of Three Hundred Thousand ($300,000.00) Dollars without the consent of all the partners. The said Anderson, Clayton & Co. does further agree to furnish any additional capital required for the conduct of the affairs of the partnership over and above the Three Hundred Thousand ($300,000.00) Dollars provided as above set forth.

Fifth. At all times during the continuance of said co-
[fol. 41] partnership the said Lamar L. Fleming, William J. Jung, William H. Koar, and William Leland Anderson shall devote their best skill and energy for the purpose of conducting the business of said co-partnership, with said

Lamar L. Fleming in charge of the general management thereof. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon loans and upon capital, taxes, and all losses for the preceding year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts shall be charged off and deducted from earnings; and such reserves shall be set up and deducted for outstanding liabilities, liquidated, contingent or deferred, or otherwise as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

[fol. 42] (1) 15½% shall be paid to Monroe D. Anderson,

(2) 20½% shall be paid to William L. Clayton,

(3) 32½% shall be paid to Lamar L. Fleming,

(4) 7% shall be paid to Lamar Fleming, Jr.,

(5) 3½% shall be paid to Harmon Whittington,

(6) 2% shall be paid to Dudley B. Cannafax,

(7) 7% shall be paid to William J. Jung,

(8) 7% shall be paid to William H. Koar,

(9) 5% shall be paid to William Leland Anderson.

Provided, however, that William J. Jung and William H. Koar shall receive seven per centum (7%) each of the net gains and profits, or the sum of Twenty-five Thousand Dollars ($25,000.00) each, whichever amount is greater,

and provided further that if the net gains and profits for any one fiscal year are less than or equal to Fifty Thousand Dollars ($50,000.00), then in that event all of such net

gains and profits shall be divided equally between William J. Jung and William H. Koar,

and still further provided that if fourteen per centum (14%) [fol. 43] of the said net gains and profits are less than Fifty Thousand Dollars ($50,000.00), then in that event the participation of the partners other than William J. Jung and William H. Koar shall be reduced proportionately to the extent that the sum of Fifty Thousand Dollars ($50,000.00) exceeds fourteen per centum (14%) of the said net gains and profits.

In the event of a net loss for any fiscal year, such net loss shall be borne by the said co-partners in the same proportion of their respective percentages of participation in the net gains and profits.

Seventh. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks, promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transac- [fol. 44] tion, business or contract outside of the regular business of the firm.

Eighth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than

thirty days written notice signed by all the other partners and served upon such partner.

Ninth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits. It is further understood and agreed that as to any one of the parties hereto, his interest in the firm shall be in accordance with this agreement and not otherwise, and that nothing whatsoever shall be paid to the estate of any deceased partner for good-will; any claim or right of each partner to have his estate participate in the good-will of said business in the event of his death is hereby expressly waived and surrendered.

[fol. 45] In Witness Whereof, the parties hereto have executed this agreement as of the first day of August, 1933:"

Witness:

C. A. Couch, G. M. Cline, A. O'Donnell, A. Bryan, L. Faris, N. DeMoin, A. O'Donnell, A. O'Donnell, A. O'Donnell, C. A. Couch, M. D. Anderson, W. L. Clayton, L. L. Fleming, Lamar L. Fleming, Jr., H. Whittington, D. B. Cannafax, William J. Jung, W. H. Koar, Wm. Leland Anderson, Anderson, Clayton & Co., by M. D. Anderson, W. L. Clayton.

[fol. 46] EXHIBIT "C"

This Agreement dated as of the 18th day of December, 1933, by and between and among Monroe D. Anderson, of Houston, Texas, Party of the first part, William L. Clayton, of Houston, Texas, party of the second part, Lamar Fleming, of Houston, Texas, party of the third part, Harmon Whittington, of Houston, Texas, party of the fourth part, Dudley B. Cannafax, of Houston, Texas, party of the fifth part, William J. Jung, of Great Neck, L. I., New York, party of the sixth part, William H. Koar, of Glen Rock, New Jersey, party of the seventh part, William Leland Anderson, of Houston, Texas, party of the eighth part, and Anderson,

Clayton & Co., a Joint Stock Association, of Houston, Texas, party of the ninth part:

Witnesseth That:

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to and do hereby associate themselves together as a co-partnership to engage in general business for the purposes and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

[fol. 47] First. The firm name of the said co-partnership shall be Anderson Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of December 18, 1933, and shall continue until July 31, 1934, and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time. The co-partnership shall operate on a fiscal year ending July 31st each year.

Fourth. The co-partnership will acquire the business and assets of the firm of Anderson, Clayton & Fleming formed pursuant to agreement dated August 1, 1933, and dissolved as a result of the death of Lamar L. Fleming on December

16, 1933, subject to the liabilities of said firm including (a) the liability of said firm to the estate of Lamar L. Fleming [fol. 48] on account of his proportion of the capital and net earnings of said firm and on account of his personal account with said firm, and (b) the liability of said firm to Anderson, Clayton & Co. on account of its proportion of the capital and net earnings of said firm, and (c) the liability of said firm to the other partners of said firm on account of their proportion of net earnings of said firm and on account of their personal accounts with said firm.

The initial capital of the new co-partnership shall be the sum of $100,000 to be contributed by Anderson, Clayton & Co. out of the liability to Anderson, Clayton & Co. on account of its capital interest in the old firm. Anderson, Clayton & Co. agrees to the transfer to the new co-partnership of such $100,000 of its capital interest in the old firm and agrees not to withdraw any of such capital of $100,000 without the consent of all the partners of the new co-partnership.

The several partners may make contributions of additional capital to the co-partnership at any time during the term of the co-partnership. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such additional contribution is made or at any time thereafter.

All capital shall bear interest at the rate of five per cent per annum, or at such other rate as may be mutually agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the term of the co-partnership and shall be charged to the expenses of the business.

[fol. 49] Fifth. At all the times during the continuance of said co-partnership, the said William J. Jung, William H. Koar and William Leland Anderson shall devote their best skill and energy for the purpose of conducting the business of said co-partnership. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for such fiscal year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of

every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon any loans and upon any capital, taxes, and all losses during such fiscal year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts, shall be charged off and deducted from earnings; and such reserves shall be set up and deducted from earnings as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

(1) 14 % shall be paid to Monroe D. Anderson,

[fol. 50] (2) 19 % shall be paid to William L. Clayton,

(3) 14 % shall be paid to Lamar Fleming,

(4) 10 % shall be paid to Harmon Whittington,

(5) 10 % shall be paid to Dudley B. Cannafax,

(6) 12-½%, or the sum of Twenty-Five Thousand Dollars ($25,000.00), whichever amount is greater, shall be paid to William J. Jung.

(7) 12-½%, or the sum of Twenty-five Thousand Dollars ($25,000.00), whichever amount is greater, shall be paid to William H. Koar,

(8) 8 %, or the sum of Sixteen Thousand Dollars, ($16,000.00), whichever amount is greater, shall be paid to William Leland Anderson.

Provided, however, that should the amount of net gains and profits for any one fiscal year be less than or equal to Sixty-six Thousand Dollars ($66,000.00), then such amount shall be distributed among William J. Jung, William H. Koar and William Leland Anderson in the ratio that their respective percentages bear to the total of their percentages; or

[fol. 51] Should 33% of the amount of net gains and profits for any one fiscal year be less than Sixty-six Thousand Dollars ($66,000.00), then the amount of such total net gains and profits in excess of Sixty-six Thousand Dollars ($66,000.00) shall be distributed among Monroe D.

Anderson, William L. Clayton, Lamar Fleming, Harmon Whittington and Dudley B. Cannafax in the ratio that their respective percentages bears to the total of their percentages.

In the event of a net loss for any fiscal year, such loss shall be borne by the said co-partners in the same proportion as their respective percentages of participation in the net gains and profits.

Seventh. In case of the death or retirement of any partner at any time other than at the end of a fiscal year, the net gains and profits or net losses for such part of such fiscal year as shall have elapsed up to date of such death or retirement shall be determined as soon as practicable by a majority of the remaining partners in the manner set forth in Article Sixth of this Agreement in respect of the determination of net gains and profits at the end of a fiscal year. The amount of such deceased or retired partner's interest in the partnership shall then be determined by a majority of the remaining members of the partnership, taking into account the amount of such deceased or retired partner's capital in the partnership, the amount of such deceased or retired partner's interest in net gains and [fol. 52] profits or net losses determined as above provided, and the amount of any credit or debit accounts between such deceased or retired partner and the partnership. Such determination of the amount of such deceased or retired partner's interest shall be final and conclusive and shall be binding upon any such deceased or retired partner and their respective executors, administrators, successors or assigns. The amount of any such deceased or retired partner's interest so determined shall be paid to any such retired partner or to the legal representatives of any such deceased partner with interest on such amount at the rate of five per cent. per annum from the date of retirement or death to the date of payment. If any such determination shows that any such deceased or retired partner has a net indebtedness to the partnership, such indebtedness shall be paid to the partnership with interest on such indebtedness at the rate of five per cent. per annum from the date of retirement or death to the date of payment. It is understood and agreed that any partner's interest in the firm shall be determined in accordance with this Agreement and not otherwise and that nothing whatsoever shall be added or calculated or paid to the estate of any deceased partner

or to any retired partner for good will and any claim or right of any partner to participate or to have his estate participate in the good will of the business in the event of his death or retirement is hereby expressly waived and surrendered.

Eighth. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books [fol. 53] of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks, promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transaction, business or contract outside of the regular business of the firm.

Ninth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities or otherwise, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than thirty days' written notice signed by all the other partners and served upon such partner.

[fol. 54] Tenth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts and liabilities thereof; second, to the return of the capital invested therein by any partner hereto and any accrued and unpaid interest on such capital; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits.

In Witness Whereof, the parties hereto have executed this agreement as of the 18th day of December, 1933.

M. D. Anderson. W. L. Clayton. Lamar Fleming. H. Whittington. D. B. Cannafax. William J. Jung. W. H. Koar. W. Leland Anderson. Anderson, Clayton & Co.

[fol. 55] EXHIBIT "D"

Anderson, Clayton & Fleming

Statement of Earnings

For the Period August 1 to December 16, 1933, Inclusive

Gross Income:		
Commissions on futures	$325,983.64	
Banking commissions	26,100.00	
Brokerage earned	19,479.00	
Commissions, forwarding and handling	3,824.40	
		$375,387.04
Expenses:		
Salaries	$27,582.50	
Commissions to outside brokers	119,475.00	
Cotton brokerage	36,318.00	
Telephone, telegraph and cable	11,010.51	
Tax on futures	7,796.30	
Clearing house expense	1,279.16	
Dues and assessments	2,125.00	
Rent	4,087.53	
Stationery and office supplies	1,322.10	
Donations	835.50	
Postage	703.95	
Advertising	604.86	
News	595.00	
Miscellaneous taxes	456.59	
Depreciation, furniture and fixtures	620.09	
Bad debts, less recoveries	*85.06*	
Miscellaneous expenses	1,910.62	
		216,637.65
		$158,749.39

[fol. 56] Deduct—Miscellaneous Charges (Net):

Interest paid:		
On personal accounts	$3,895.70	
On capital	6,900.00	
	$10,795.70	
Less—Interest received	5,614.61	
	$5,181.09	
Adjustment of "spot" commissions, prior year	562.50	
		5,743.59
Profit, before commissions on open contracts and losses on revaluation of investments		$153,005.80
Add—Commissions Accrued on Open Contracts		42,753.05
		$195,758.85
Deduct—Losses on Revaluation of Investments		41,241.10
Net Earnings for the Period, carried to Balance Sheet		$154,517.75

[fol. 57] EXHIBIT "E"

Anderson, Clayton & Fleming
Schedule of Investments—December 16, 1933

	Cost	Book Value at Market	Loss on Revaluation
Marketable Securities Deposited with New York Cotton Exchange Clearing Association, Inc.:			
U. S. Treasury Notes, Series C, 2 7/8's, due April 15, 1947 (par value $40,000.00)	$40,675.00	$39,850.00	$825.00
U. S. Treasury Bonds, 3 3/8's, due June 15, 1947 (par value $50,000.00)	50,875.00	49,500.00	1,375.00
Total, carried to Balance Sheet	$91,550.00	$89,350.00	$2,200.00

EXHIBIT "E"—Continued

Anderson, Clayton & Fleming
Schedule of Investments—December 16, 1933

	Cost	Book Value at Market	Loss on Revaluation
Miscellaneous Stocks and Bonds:			
Cosgrove-Meehan Coal Corporation Gold Bonds, 1945, 6-1/2's (par value $35,000.00)	$17,587.50	$1,429.75	$16,157.75
Suburban Light & Power Company 100 shares, First Preferred Stock			
Middlewest Utilities, 156 shares, Common Stock	3,267.00	83.65	3,183.35
Total, carried to Balance Sheet	$20,854.50	$1,513.40	$19,341.10
[fol. 58] New York Cotton Exchange Memberships:			
In name of:			
L. L. Fleming	$17,000.00	$18,000.00	*$1,000.00*
Wm. J. Jung	35,000.00	18,000.00	17,000.00
Leland Anderson	21,700.00	18,000.00	3,700.00
Total, carried to Balance Sheet	$73,700.00	$54,000.00	$19,700.00
Total loss on revaluation			$41,241.10

[fol. 59] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the following facts are true, reserving, however, to either party the right to introduce other evidence:

(a) The following letter accompanied the return filed on February 28, 1934 on behalf of "Anderson, Clayton & Fleming in Liquidation" (referred to in paragraph 21 of the Stipulation of Facts and Exhibits herein):

"Letterhead of Anderson, Clayton & Fleming, 60 Beaver Street, New York

Anderson, Clayton & Co., Oklahoma City, Houston, Savannah, Atlanta, New Orleans, Boston

[fol. 60] New York, N. Y., February 27, 1934.

Collector of Internal Revenue, Custom House, New York, N. Y.

DEAR SIR:

This partnership has a fiscal year ending July 31 and as customary filed their Annual Partnership Return on October 13, 1933. On December 16, 1933, our Senior Resident Partner, Mr. Lamar L. Fleming, died, causing the dissolution of the partnership. It was subsequently agreed among the surviving partners that a new partnership should be formed as of December 18, 1933, to purchase from the partnership in liquidation its assets and liabilities as of December 16, 1933.

Accordingly, we are enclosing Partnership Return this 27th day of February 1934, which is within two and one-half months of the date of dissolution of the firm, December 16, 1933.

Very truly yours, (Signed) Anderson Clayton & Fleming, W. H. Koar, Partner."

WHK/D.
Enclosure.

[fol. 61] (b) In the return filed on behalf of "Anderson, Clayton & Fleming in Liquidation" on February 28, 1934, there was deducted a loss of $4,525.00 from the sale of stocks and bonds held for less than two years in arriving at the net income of the partnership. In addition, such return showed, under the heading "Partners' or Members' shares of Income and Credits", capital losses aggregating $36,716.10, of which the decedent's share was shown to be $11,932.73. The ordinary loss of $4,525.00 and the capital loss of $36,716.10 claimed in the return made up the loss of $41,241.10 on revaluation of firm securities, shown on Exhibit E attached to the Stipulation of Facts and Exhibits herein.

(c) In auditing the return filed on behalf of "Anderson, Clayton & Fleming in Liquidation" on February 28, 1934, and the returns of the individual partners for the calendar year 1933, the Commissioner disallowed the losses of $41,241.10 and increased the income of the partnership by that amount. The ground of this action as stated in the examining agent's report upon the audit of the partnership return was as follows:

"Loss of $41,241.10 as claimed on sale of securities has been disallowed as examination discloses no sales made, and loss as claimed represented the difference between the original cost and market value as of 12/16/33."

(Sgd.) Weston Vernon Jr., Counsel for Petitioner.

(Sgd.) Robert H. Jackson, Counsel for Respondent.

Dated: Nov. 11, 1935.

[fol. 62] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 78362. Promulgated April 21, 1936

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent,

Findings of Fact and Opinion

1. Decedent, until his death on December 16, 1933, was a member of a New York partnership. Both decedent and the partnership were on the cash receipts and disbursements basis. Decedent reported his income on a calendar year basis and the partnership, on that of a fiscal year ending July 31, 1933. The partnership contract provided for only one accounting period, which was at the close of its fiscal year. Decedent died December 16, 1933. Under a provision of the partnership contract, the surviving partners continued the firm for the purposes of liquidation, which was completed during 1934. Held, only the distributive share of the profits of the partnership for its fiscal year ended July 31, 1933, is includable in decedent's taxable income for the period January 1, to December 16, 1933. Abe De Roy et al., Executors, 19 B. T. A. 452; R. W. Archbald, Jr., et al., Executors, 4 B. T. A. 483, followed.

[fol. 63] 2. Id.—Commissions earned by such partnership between the end of its fiscal year and decedent's death, but not collected by the partnership nor received by or available to decedent prior to his death, are not includable as income of decedent for the period prior to his death.

3. Id.—Interest on decedent's contributed partnership capital, as well as interest on his credit balance with the

partnership for the period between the end of the partnership's fiscal year and his death, is merely partnership profits (Billwiller's Estate, 31 Fed. (2d) 286; certiorari denied, 279 U. S. 866; John A. L. Blake, 9 B. T. A. 651), and, as such, is likewise here not taxable as income to decedent for the period prior to his death.

Weston Vernon, Jr., Esq., for the petitioner. Harold Allen, Esq., for the respondent.

The petitioner, as executor of the estate of Lamar L. Fleming, deceased, seeks redetermination of a deficiency in income tax of $39,874.31 for the taxable period from January 1 to December 16, 1933. The petitioner alleges that the respondent erred in including in the decedent's income for that period, his distributive share of the profits of a partnership, of which he was a member, from July 31 to December 16, 1933, when he died. He makes the same contention as to certain commissions earned by the partnership, and certain interest due decedent from the partnership. The facts have been stipulated and from them [fol. 64] we make the following findings of fact.

FINDINGS OF FACT

The decedent, Lamar L. Fleming, died December 16, 1933. For a number years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, engaged in the cotton business, with its principal place of business in New York City and branches in other cities of the United States and Europe.

The business of the partnership was operated on the cash receipts and disbursements basis with a fiscal year ending July 31 of each year. The decedent likewise kept his accounts on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis.

On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits. This new agreement provided that its fiscal year should begin August 1, 1933, and end July 31, 1934.

In accordance with the contract of partnership an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding 12 months. A large portion of his share was allowed to remain to his credit with the partnership.

No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent. The part-
[fol. 65] nership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year.

After the death of Lamar L. Fleming the business of the partnership was continued by the surviving partners under the same name. In May 1934, they entered into a new contract of partnership taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and from year to year thereafter.

Shortly after the death of decedent an account was taken covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership $298,730.19, which consisted of the $100,000 capital invested by the decedent, the credit balance on deposit due decedent of $162,795.67, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933, in the sum of $35,150.88, and interest of $783.64.

In February 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56. This latter sum included $13,894.74 as decedent's share of commissions earned by the partnership between the end of its fiscal year and the death of decedent, but not collected until 1934 in accordance with a trade custom.

Decedent's executors duly filed his income tax return for the period January 1 to December 16, 1933, date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933, but did not include therein his share of the profits
[fol. 66] of the partnership earned between July 31, 1933, the end of its fiscal year and the date of his death, December 16, 1933. Likewise the decedent's share of the open commissions earned during that period and interest on his capital investment and credit balance with the partnership were omitted.

In determining the deficiency the respondent included in decedent's income the sum of $63,494.46 representing partnership profits for the period between July 31 and December 16, 1933, and $5,559.19 unreported interest. The item of $63,494.46 included the cash earnings of the part-

nership during the period and also the uncollected commissions earned during that period in the sum of $13,894.74. The unreported interest of $5,559.19 consisted of $3,209.19 interest on decedent's credit balance for that period, $2,300 interest on his capital investment, and $50 from some other source.

The executors of the estate of the decedent duly filed an estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon.

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ended December 16, 1933, and on October 28, 1934, they filed a return for the fiscal year December 17, 1933, to July 31, 1934. Both of these were made without permission or direction of the respondent.

On or about March 5, 1935, the executors of the estate of the decedent waived the restrictions upon the assess- [fol. 67] ment of $37,917.39 out of a total deficiency in tax determined by the Commissioner in his letter of October 25, 1934, amounting to $39,874.31. Such waiver was made after the petition to the Board of Tax Appeals had been filed herein, and was made without prejudice to the right of the executors to prosecute the pending appeal and to recover any amount refundable under the final decision of the Board herein. Following the waiver of the restrictions upon the assessment of $3,917.39, the Commissioner assessed such amount against the executors of the decedent, together with interest thereon in the amount of $2,318.67, making a total of $40,236.06. The Commissioner applied as a credit against such taxes and interest the amount of an overassessment in the decedent's income tax for the calendar year 1932, amounting to $1,956.92, together with interest thereon amounting to $149.02, and issued a notice and demand upon the decedent's estate for a total of $38,130.12, consisting of $35,811.45 in tax and interest of $2,318.67, which was paid by the decedent's executors on April 15, 1935.

OPINION

LEECH:

The dominant issue is whether decedent's return for the period from January 1 to December 16, 1933, the date of

his death, should include decedent's share of the partnership profits for the interval between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, when decedent died. Both decedent and the partnership were on a cash receipts and disbursements basis.

[fol. 68] The Revenue Act of 1932 is controlling. Section 182 (a) provides:

Sec. 182. Tax of Partners.

(a) General Rule.—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership, for any taxable year of the partnership ending within his taxable year.

The "taxable year" of the partnership differed here from the "taxable year" of the decedent, since such year of the partnership was its fiscal year ended July 31, 1933, and that of the decedent was the calendar year. Sec. 48 (a).[1] Thus the determination of decedent's taxable income for the period from January 1 to December 16, 1933, when he died, "*shall* be based upon the income of the partnership [fol. 69] for any taxable year of the partnership ending within his taxable year." Sec. 182 (a), supra. A taxable year of the partnership ended on July 31, 1933. No other such year ended before decedent's death, unless decedent's death, ipso facto, terminated a second "taxable year" of the partnership.

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[1] Sec. 48. Definitions.

When used in this title—

(a) Taxable Year.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

The partnership contract provided for only one accounting period, which was at the close of the fiscal year. A provision for any other termination of the taxable year, except by mutual agreement, was not included in the contract. Article nine of the agreement reads in part as follows:

In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits.

The surviving partners, after decedent's death, carried on the partnership for the purpose of its liquidation, which was not completed until 1934. None of the proceeds of that liquidation were received by or available to decedent, and were not available to or received by petitioner, his representative, until 1934.

This partnership was a New York firm. Under the law of that state, not only the addition of a partner does not effect the dissolution of a partnership, (Helvering v. [fol. 70] Archbald, 70 Fed. (2d) 720), but the death of the decedent partner, though it may cause dissolution, certainly does not terminate the "taxable year" of the partnership where, as here, the surviving partners continue it for purposes of liquidation. Partnership Law of New York, secs. 60, 61 and 62.[2]

As this Board held in Abe De Roy et al., Executors, 19 B. T. A. 452, upon identical facts arising under section

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[2] § 60. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§ 61. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§ 62. Dissolution is caused:

* * * * * * *

(4) By the death of any partner;

218 (a) of the Revenue Act of 1924, which is substantially the same as section 182 (a) of the Revenue Act of 1932, supra, here applicable:

* * * The death of the partner did not terminate or shorten the accounting period of the partnership and there was only one accounting period of the partnership ending in the decedent's taxable year before us. * * * See R. W. Archbald, Jr., et al., Executors, 4 B. T. A. 483, where we said:

"It seems clear to us that the death of a partner does not shorten the partnership's fiscal or calendar year to an accounting period terminating at the death of the partner [fol. 71] and that only a complete liquidation during the calendar or fiscal year terminates the accounting period. This partnership has but one accounting period ending in 1920. The statutory net income of the partnership could not in this instance be computed before the close of its fiscal year. This being our view, we must hold that there should be included in the deceased's return of income for 1920 only his distributive share of the partnership net income for its fiscal year ending January 31, 1920."

To sustain respondent and include in decedent's taxable income, for the period prior to his death, the partnership income earned between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, the date of Decedent's death, would require our violation of the basic tenet of income tax law that such tax is assessed on the basis of a period of 12 months. See Helvering v. Morgan's Inc., 293 U. S. 121; General Machinery Corporation, 33 B. T. A. 1215. The Revenue Act of 1932, section 47, specifically provides for "Returns for a period of less than twelve months." See also section 48 (a) supra. The statute does not include a provision permitting returns for a period of more than twelve months. This Board refused to increase such period in the De Roy case, supra, and in R. D. Archbald, Jr., et al., Executors, 4 B. T. A. 483. Both of those cases are directly in point. The De Roy case involved facts identical with those here, and it was decided after the appeal of Maurice L. Goldman et al., Executors, 15 B. T. A. 1341, which qualified the rule adopted in the [fol. 72] Archbald case. See United States v. Wood, 79 Fed. (2d) 286; G. C. M. 2308, vol. VI-2 C. B. 229, 1927.

Respondent cites Maurice L. Goldman et al., Executors, supra; Clarence B. Davison, Executor, 20 B. T. A. 856; affd., 54 Fed. (2d) 1077; J. L. Hall et al., Executors, 25 B. T. A. 1; Beverly W. Smith, Administrator, 26 B. T. A. 778; affd., 67 Fed. (2d) 167; First Trust Co. of Omaha v. United States, 1 Fed. Supp. 900; Peoples-Pittsburgh Trust Co. v. United States, 10 Fed. Supp. 139. None of these cases, nor any other to which our attention has been directed, disturbs the rule followed in the Archbald and De Roy cases in its application to the facts presented here.

The argument that the disputed income thus escapes income tax should be addressed to Congress, not to this Board. See Commissioner v. City Bank Farmers Trust Co., 296 U. S. 85; Sawtell v. Commissioner, — Fed. (2d) — (C. C. A., 1st Cir., March 6, 1936).

Respondent's contention, that the returns filed by the surviving partners estop petitioner from taking his present position, is untenable. Those returns were filed without the consent of the Commissioner. In our view of the law just stated, which, of course, the surviving partners could not alter, these returns were neither authorized nor required. Revenue Act of 1932, sec. 189;[3] Regulations 77, art. 941.[4]

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[3] Sec. 189. Partnership Returns

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

[4] Art. 941. Partnership returns.—Every partnership must make a return of income, regardless of the amount of its net income. The return shall be on Form 1065 and shall be sworn to by one of the partners. Such return shall be made for the taxable year of the partnership, that is, for its annual accounting period (fiscal year or calendar year, as the case may be), irrespective of the taxable years of the partners. (See sections 182 and 183 and articles 901-903.) If the partnership makes any change in its accounting period, it shall make its return in accordance with the provisions of section 47 and article 371. (See also article 744.)

[fol. 73] But, aside from other frailties, the argument falls because it is not established that respondent relied upon any act of the decedent or petitioner to respondent's detriment. When petitioner took the position upon which he now stands, on instituting these proceedings, respondent could have then availed himself of any steps possible to him which were so prior to the filing of these returns. No statute of limitations prevented such steps. Revenue Act of 1932, sec. 275 (a).[5] The absence of that detriment here, alone, defeats the plea of estoppel. Helvering v. Brooklyn City R. Co., 72 Fed. (2d) 274. The petitioner is sustained on the first and controlling issue.

The second issue relates to the propriety of respondent's action in including in decedent's prior-to-death return the open or uncollected commissions on sales by the partnership which were earned subsequent to the end of the partnerships' fiscal year, and not collected until 1934, after the [fol. 74] death of the decedent. Since the partnership was on a cash basis and the practice of the trade, in which the partnership was engaged, was that such commissions were not payable to the firm until 1934, after delivery in the execution of the sale, it is at least doubtful whether these commissions could be held to have been constructively received, even by the partnership before that year. Revenue Act of 1932, sec. 42.[6] Avery v. Commissioner, 291 U. S. 657. In any event, these commissions, even if constructively received by the partnership between July 31, 1933,

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[5] Sec. 275. Period of Limitation Upon Assessment and Collection

Except as provided in section 276—

(a) General Rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

[6] Sec. 42. Period in Which Items of Gross Income Included

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

and decedent's death, were earnings of the partnership. Thus, respondent's inclusion of them in decedent's income for the questioned period is precluded by the same rule applied above. R. W. Archbald, Jr. et al., Executors, supra; Abe De Roy et al., Executors, supra. The suggestion of respondent, that this item was not mentioned in the pleadings and therefore should not be considered now, is without merit. These commissions were merely a part of the partnership profits for the disputed period, all of which are in controversy. They were included in the stipulated facts upon which the case was submitted for determination.

Respondent refers to section 42 of the Revenue Act of [fol. 75] 1934[7] as a "clarification of existing law." We disagree with that construction. That provision, in our judgment, changed the law. Nichols v. United States, 64 Ct. Cls. 241; Report of the Ways and Means Committee, p. 24, H. R. No. 704, 73d Cong., 2d sess. Neither the provision itself, nor the cited report, indicates its operation was intended to be retroactive. Thus it can not be so construed. Shwab v. Doyle, 258 U. S. 529. Cf. Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126.

The third issue involves the correctness of respondent's inclusion of two items of interest in decedent's taxable income for the period immediately prior to his death. These items consist of interest in the amount of $2,300 on his capital investment in the firm, and interest in the amount of $3,209.19 on the credit balance which decedent had left with the partnership.

The fourth article of the contract of the partnership is that:

All capital shall bear interest at the rate of six per cent

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[7] Sec. 42. Period in Which Items of Gross Income Included

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

(6%) per annum, or at such other rate as mutually may be [fol. 76] agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

But despite this proviso concerning the first item, we think both items, denominated interest, were merely partnership profits and taxable to decedent just as any other such profits. Billwillter Estate v. Commissioner, 31 Fed. (2d) 286; certiorari denied, 279 U. S. 866; John A. L. Blake, 9 B. T. A. 651. These items were, therefore, also improperly included by respondent in decedent's taxable income here. R. W. Archbald, Jr., et al., Executors, supra; Abe De Roy et al., Executors, supra.

Decision will be entered under Rule 50.

[fol. 77] Before United States Board of Tax Appeals, Washington, D. C.

Docket No. 78362

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Decision

Pursuant to the Opinion of the Board promulgated April 21, 1936, the respondent herein having filed on May 12, 1936, a notice of settlement and proposed recomputation, which was placed on the Day Calendar of June 3, 1936, and, at the call of the same on said Calendar, the petitioner, through counsel, having filed on May 29, 1936 a motion praying that the Board enter a decision in accordance with said recomputation, now, therefore, it is

Ordered and Decided: that the petition herein respecting income tax liability for the period January 1, 1933 to December 16, 1933, was filed on January 19, 1935, and claims for refund were filed by petitioner on February 15, 1935 and May 21, 1935; that within two years before the filing of the petition, tax was paid and credited in the amount of

$114,297.45, for the period January 1, 1933 to December [fol. 78] 16, 1933; that the liability for said period is $76,408.56; and, therefore, in accordance with section 504 (a), Title III of the Revenue Act of 1934, there is an overpayment of $37,888.89 for the period January 1, 1933 to December 16, 1933.

(Signed) J. Russell Leech, Member. (Seal.)

Entered Jun. 4, 1936.

[fol. 79] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Petition for Review and Assignments of Error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson ,Assistant Attorney General, Herman Oliphant, General Counsel for the Bureau of Internal Revenue, and R. H. Transue, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Your petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. [fol. 80] Your respondent on review (hereinafter referred to as the taxpayer) is a corporation with principal place of business at New York, New York. As executor of the Estate of Lamar L. Fleming, deceased, the taxpayer filed its income tax return for the period involved in this case with the Collector of Internal Revenue for the Second District of New York, whose office is located in the city of New York and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner determined a deficiency in Federal income tax against the taxpayer for the period January

1 to December 16, 1933 in the amount of $39,874.31, and on October 25, 1934, in accordance with the provisions of section 272, Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on January 19, 1935, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, being Docket No. 78362. On April 21, 1936 the said Board of Tax Appeals promulgated its opinion and on June 4, 1936 entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that the deficiency asserted by the Commissioner was erroneous. The opinion of the Board is published in 34 B. T. A. 384.

III

The nature of the controversy is as follows:

The petition for review grows out of the determination by the Commissioner that the taxable net income of the [fol. 81] taxpayer should be increased in the amount of $49,599.72, representing the decedent's distributive share of the profits of the partnership of Anderson, Clayton & Fleming for the period August 1, 1933 to December 16, 1933. No exception is taken by the Commissioner to the exclusion by the Board from taxable income of the taxpayer for this period of (1) the decedent's distributive share of commissions earned by such partnership but not collected between the end of its fiscal year and decedent's death and not collected by the partnership nor received by or available to decedent prior to his death and (2) interest on the decedent's contributed partnership capital as well as interest on his credit balance with the partnership for the period between the end of the partnership's fiscal year and the date of his death.

The facts involved were stipulated by the parties and are as follows:

The decedent, Lamar L. Fleming, died December 16, 1933. For a number of years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, engaged in the cotton business, with its principal place of business in New York City and branches in other cities of the United States and Europe.

The business of the partnership was operated on the cash receipts and disbursements basis with a fiscal year ending July 31 of each year. The decedent likewise kept his accounts on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis.

On August 1, 1933, a new partner was admitted to the [fol. 82] firm and a new partnership agreement was made which was identical with the previous one, except as to the division of the profits. This new agreement provided that its fiscal year should begin August 1, 1933, and end July 31, 1934.

In accordance with the contract of partnership an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding twelve months. A large portion of his share was allowed to remain to his credit with the partnership. No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent. The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year.

After the death of Lamar L. Fleming the business of the partnership was continued by the surviving partners under the same name. In May 1934, they entered into a new contract of partnership taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and from year to year thereafter.

Shortly after the death of decedent an account was taken covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership $298,730.19, which consisted of the $100,000 capital invested by the decedent, the credit balance on deposit due decedent of $162,795.67, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933, in [fol. 83] the sum of $35,150.88, and interest of $783.64.

In February 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56. This latter sum included $13,894.74 as decedent's share of commissions earned by the partnership between the end of its fiscal year and the death of decedent, but not collected until 1934 in accordance with a trade custom.

Decedent's executors duly filed his income tax return for the period January 1 to December 16, 1933, date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933, but did not include therein his share of the profits of the partnership earned between July 31, 1933, the end of its fiscal year and the date of his death, December 16, 1933. Likewise the decedent's share of the open commissions earned during that period and interest on his capital investment and credit balance with the partnership were omitted.

In determining the deficiency the Commissioner included in decedent's income the sum of $63,494.46 representing partnership profits for the period between July 31 and December 16, 1933, and $5,559.19 unreported interest. The item of $63,494.46 included the cash earnings of the partnership during the period and also the uncollected commissions earned during that period in the sum of $13,894.74. The unreported interest of $5,559.19 consisted of $3,209.19 interest on decedent's credit balance for that period, $2,300 interest on his capital investment, and $50 from some other source.

The executors of the estate of the decedent duly filed an [fol. 84] estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon.

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ended December 16, 1933, and on October 28, 1934, they filed a return for the fiscal year December 17, 1933, to July 31, 1934. Both of these were made without permission or direction of the Commissioner.

The Board of Tax Appeals held that no part of taxpayer's distributive share of the partnership profits of Anderson, Clayton & Fleming for the period August 1, 1933, to December 16, 1933, in the amount of $49,579.72 constituted income of the taxpayer for the period January 1 to December 16, 1933.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner hereby as-

signs the following errors which he avers occurred in such record, proceedings, decision and final order of redetermination so entered by the Board, to wit:

1. The Board erred in holding that only the distributive share of the profits of the partnership of Anderson, Clayton & Fleming for its fiscal year ended July 31, 1933 is includable in the taxable income of the taxpayer for the period January 1 to December 16, 1933.

[fol. 85] 2. The Board erred in not holding that the distributive share of the profits of the partnership of Anderson, Clayton & Fleming for the period August 1, 1932 to December 16, 1933 is includable in the taxable income of the taxpayer for the period January 1 to December 16, 1933.

3. The Board erred in finding that the entire deficiency asserted by the Commissioner was erroneous.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Robert H. Jackson, Assistant Attorney General. (Signed) Herman Oliphant, General Counsel for the Department of the Treasury. (Signed) R. H. Transue, Special Attorney, Bureau of Internal Revenue.

[fol. 86] *Duly sworn to by R. H. Transue. Jurat omitted in printing.*

[fol. 87] In United States Circuit Court of Appeals

[Title omitted]

Notice of Filing Petition for Review

To Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, 140 Broadway, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of August, 1936, file

with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

[fol. 88] Dated this 21st day of August, 1936.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

[fol. 89] [Title omitted]

STATE OF NEW YORK,
County of New York, ss:

Morris Heier, being first and duly sworn, says:

I am a citizen of the United States of America, over the age of twenty-one years and not a party to or in any way interested in the petition for review to the United States Circuit Court of Appeals for the Second Circuit in the above-entitled case;

That, on the 24th day of August 1936, I did personally serve a copy of the said petition for review and also a copy of notice of filing petition for review on E. T. Murray, Jr., Secretary, Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

(Signed) M. Heier, Internal Revenue Agent.

Subscribed and sworn to before me this 27th day of August, 1936. (Signed) J. P. O'Keefe, Internal Revenue Agent.

[fol. 90] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To Weston Vernon, Jr., Esq., 15 Broad Street, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of August, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit,

of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated, this 21st day of August, 1936.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

[fol. 91] Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 27th day of August, 1936.

(Signed) Weston Vernon, Jr., Attorney for Respondent on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PRÆCIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit [fol. 92] Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
3. Findings of Fact, Opinion and Decision of the Board.
4. Petition for Review, together with proofs of service of notice of filing petition for review and of service of a copy of petition for review.
5. This præcipe.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within præcipe is hereby admitted this 15th day of October, 1936.

(Signed) Western Vernon, Jr., Attorney for Respondent.

[fol. 93] In United States Circuit Court of Appeals

[Title omitted]

Respondent's Præcipe for Record

To the Clerk of the United States Board of Tax Appeals:

Please include in the record which you are preparing pursuant to the præcipe for record filed on October 17th, 1936 by the Commis-ioner of Internal Revenue, and deliver to the Clerk of the Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in addition to those listed in the Commissioner's præcipe filed on October 17th, 1936:

1. Stipulation of Facts and Exhibits dated November 11, 1935, including exhibits A, B, C, D and E attached thereto.
2. Supplemental Stipulation of Facts dated November 11, 1935.
3. This præcipe.

Weston Vernon Jr., Attorney for Respondent.

[fol. 94] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued April 7, 1937. Decided May 3, 1937

No. 262

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Respondent

Appeal from the Board of Tax Appeals

Before Manton, L. Hand, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals. On appeal from the determination by the Commissioner of a deficiency the Board found an over-payment of taxes. Reversed.

Robert H. Jackson, Asst. Atty. Gen., and Sewall Key, S. Louis Monarch, and Alexander Tucker, Sp. Asst. to Atty. Gen., for petitioner.

Davis, Polk, Wardwell, Gardiner & Reed, of New York City (Walter D. Fletcher, Weston Vernon, Jr. and Allen A. Dobey, all of New York City, of counsel), for respondent.

CHASE, Circuit Judge:

The respondent is the executor of the estate of Lamar L. Fleming, who died on December 16, 1933. Mr. Fleming was at the time of his death a resident of New York and a member of the partnership of Anderson, Clayton & Fleming whose principal place of business was in New York City. The decedent had filed his returns of income for calendar years on the cash receipts and disbursements basis. The partnership had filed its information returns on the same method of accounting but for fiscal years ending July 31st. On July 31, 1933, a new partner was admitted and a new partnership agreement was executed which kept the fiscal year the same and provided for the distribution of profits at the end of the fiscal year. No partnership profits earned

after July 31, 1933, were received or were receivable by the decedent under the terms of the partnership agreement up to the time of his death. Though all previous earnings to which he was entitled were available to him, he left a portion of them on deposit with the partnership.

After Mr. Fleming died there was an accounting for the period between July 31, 1933, and the date of his death and in January, 1934, a partial, and in the following month a final, distribution was made to his executor of his credit deposit and his share of the earnings up to the time he died.

His executor filed an income tax return for him for the period from January 1, 1933, to December 16, 1933, in which were included his entire share of the partnership profits for the fiscal year ending July 31st but none for the remainder of 1933 to the date of his death. The profits for the last-mentioned period were, however, included in the estate tax return filed for him. On February 28, 1934, an information return was filed "for the fiscal year beginning August 1, 1933, and ended December 16, 1933," for the partnership in liquidation.

The deficiency determined by the Commissioner was the result of his inclusion in the income of the decedent of his share of the profits earned after July 31, 1933, up to his death. The Board held those profits were not includable, and whether or not they were is the issue before us.

Section 181 of the Revenue Act of 1932 (47 Stat. 222, 26 U. S. C. A. § 181 and note) provided, as did previous stat- [fol. 96] utes, that partners should be liable for an income tax only in their individual capacity, and section 182 of the same act (47 Stat. 222) taxed to each partner his distributive share of the net partnership income for the taxable year, whether distributed or not. It also provided that: "If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year." Regulations follow the statute in this respect.

Whether the death of Mr. Fleming within his taxable year brought about the ending of what is called in the statute a "taxable year of the partnership" determines whether the Commissioner or the Board was right. As the partnership was subject to the laws of New York, it was not terminated by the death of Mr. Fleming, though

it was dissolved and continued only for purposes of liquidation until the partnership affairs were wound up. Sections 60, 61, and 62, subd. 4 of the New York Partnership Law (Consol Laws, c. 39). As a continuing source of income to the decedent, it ceased to exist when he died. Darcy v. Commissioner (C. C. A.) 66 F. (2d) 581. The accounting whenever it took place was as of that date. That was when in contemplation of law his share of the profits became distributable. That is to say, though a partnership is not a taxpayer, what is called a partnership taxable year ended when the partnership was dissolved by the death of a partner. Of course this made two "partnership taxable years" end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. The period for which the decedent's income is taxed is a little less than twelve months and the income on which he is taxed is only that distributable to him as of that period. To be sure, it was not physically possible to distribute any post July 31, 1933, partnership income to him after his death but whatever partnership profits were earned from July 31, 1933, to the date of his death later in that year were nevertheless to the extent of his share earned by him in his lifetime and taxable to him as income though they might form a part of the corpus of his estate and be subject to an estate tax also. Bull v. United States, 295 U. S. 247, 254, 55 S. Ct. 695, 697, 79 L. Ed. 1421.

Strictly speaking, a partnership has no taxable year since it is not a taxpayer. It is required to file information returns for so-called taxable years which are either fiscal or calendar and are in fact accounting periods covering twelve months. This does not mean that there can be no accounting period of a partnership for income tax purposes for less than twelve months. The present case serves well as an example of what will shorten such an accounting period or taxable year of a partnership, viz., the dissolution of the partnership caused by the death of a partner after the beginning of the current year and before its end. Another would be a partnership which for one reason or another never existed for a full year. So we hold that the phrase "partnership taxable year," as

used in section 182(a) of the Revenue Act of 1932, should be construed to include an accounting period of the partnership fixed at less than a year by the dissolution of the partnership caused by the death of a partner. Consequently the Commissioner properly included the decedent's share of the post July 31, 1933, partnership income.

Decision reversed.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 10th day of May one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, as Executor, etc., Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 98] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Commissioner of Internal Revenue vs. Guaranty Trust Company of New York, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1937. William Parkin, Clerk.

[fol. 99] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 98, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Commissioner of Internal Revenue, Petitioner, against Guaranty Trust Company of New York, as Executor, etc., Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fourth day of June, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,782. U. S. Circuit Court of Appeals, Second Circuit. Term No. 301. Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed August 10, 1937. Term No. 301, O. T., 1937.